IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Appeal No. 120-SB of 1996

Date of Decision: October 09, 2007

Surinder Singh

Appellant

VERSUS

State of Punjab

Respondent

CORAM: HON'BLE MR.JUSTICE RANJIT SINGH

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr.Sapan Dhir, Advocate,
for the Appellant

Mr.Shailesh Gupta, DAG, Punjab

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RANJIT SINGH J.

Appellant Surinder Singh, statedly aged 16 year, faced prosecution for offence under Sections 376/452 IPC and was sentenced to suffer R.I. for ten years coupled with fine of Rs.500/-. He was further directed to undergo R.I. for two months in case of default of payment of fine. He is also sentenced to suffer R.I. for two years and fine of Rs.500/- for an offence under Section 452 IPC with

direction to undergo identical sentence of two months in case of default in payment of fine. He has impugned his conviction and the award of sentence as aforementioned.

The facts, in brief, are that on 01.10.1994, Gurbachan Kaur made a statement before ASI Varinder Jit Singh to the effect that she is resident of village Shahjadpur and her husband was a labourer. As per the lady, on 30.9.1994, her husband had gone out for a work and she was present in her house alone with her children. At about 5.00 p.m. appellant Surinder Singh allegedly entered into her house after scaling the wall, and caught hold of the lady from her neck and threw her down on the bed lying in room. The appellant also tore her clothes and thereafter committed sexual intercourse with her against her consent. Her daughter Manjit Kaur had started crying seeing all this. Prosecutrix also raised raula which attracted Joginer Kaur, her neighbour who rebuked the appellant Surinder Singh for having committed this indecent act. The appellant thereupon, dis-appeared from the spot. The lady complains that she has been subjected to this offence because of being from poor strata of society. She, otherwise, accompanied by her husband, had gone to the village Sarpanch Gurpreet Singh, who took them to the police station for lodging the report. That is how she had made statement before ASI Varinderjit Singh as referred above. The FIR Ex.PA/2 was accordingly recorded. The prosecutrix was subjected to medical examination at civil hospital Fatehgarh Sahib. The statements of Manjit Kaur, daughter of the prosecutrix and Joginer kaur, her neighbour, were also recorded. The case property like bed sheet, torn clothes etc. were also seized. On completion of investigation,

the prosecution of the appellant followed leading to his conviction and sentence.

The case of the prosecutrix is supported by the evidence given by Joginer Kaur (PW-1), Gurbachan Kaur (PW-2) and Doctor Prabhat Shobha (PW-3), ASI Varinderjit Singh (PW-4) and Dr.Sanjeev Kumar (PW-5).

The appellant, when confronted with the evidence and circumstances appearing against him, pleaded false implication due to political enmity between his father and Sarpanch of the village. Appellant says that his father got the Sarpanch suspended for his illegal activities in the village and that is why the Sarpanch has taken up this stand against the family of the appellant. The complainant belongs to the party of the Sarpanch and had made this false allegation at the instance of the Sarpanch. In addition he also produced documents Ex.D1 to D7 in support of his defence.

Learned counsel, appearing for the appellant, without making any submission on merit has drawn my attention to the fact that one of the pleas raised by the appellant before the trial Court was that he was a juvenile being less than 16 years of age and accordingly his trial should have been held by juvenile Court. This plea was also raised before the trial Court. In support of this plea, the appellant has heavily relied on Ex.D1 which is the date of birth certificate of the appellant. If this date is accepted as a date of birth of the appellant then concededly he would be less than 16 years of age and as such a juvenile and so required to be treated as a juvenile and tried accordingly. In that eventuality, his trial by the Sessions Court would be without jurisdiction as was pleaded by the appellant before the

Court.

It may need a notice that if the appellant is found to be juvenile in terms of Section 2 (h) of Juvenile Justice Act 1986, then he could be entitled to the protection under the said act. He may then have to be sent to juvenile home as per Section 9 of the Act or special house in terms of Section 10 or to observation home as per Section 11 thereof. This plea when raised before the trial Court was negatived on a consideration which may not sound proper. While dealing with this submission and disbelieving the date of birth certificate Ex.D1, the trial Court noticed that this certificate shows the date of birth of the appellant to be 18.01.1979 and this certificate was issued on 27.11.1995. It is then noticed that in the natural course of events, name of the child is not mentioned in the birth certificate as it would take time for the family to name the newly born child. The trial Court also observed that this is generally done by taking blessings of 'Shri Guru Granth Sahib ji'. It is further observed that the defence did not produce the date of birth certificate of other sons to prove this fact firmly. Without much justification, the trial Court recorded its own observations by saying that the appellant did not appear less than 17 years of age from his appearance. In support of this off the cuff observation on the basis of appearance, the Court seems to be relying on the evidence of doctor Sanjeev Kumar (PW-5) which also suffered from similar infirmity. P W-5 never examined the appellant for determining his age. He had otherwise medically examined him on 08.10.1994 and had given his age as 17 years from his appearance without any basis. Accordingly the case of the appellant was not referred to the juvenile Court.

The Hon'ble Supreme Court in the case of **Jityendra Ram @ Jitu vs. State of Jharkhand (SC) 2006 (3) RCR (Crl.) 165** has gone into the aspect of making available the beneficial provision of Juvenile Justice Act. In this case also no submission was made by the appellant on merits of the case before the Hon'ble Supreme Court. Still by noticing the beneficial provisions of Juvenile Justice Act, the Hon'ble Supreme Court remanded the case back to the trial Court for re-determination the age of the appellant therein. It is observed that the provisions of this beneficial legislation should ordinarily be given effect to. In this case no school certificate or date of birth certificate was produced but still the Court observed that the person being literate presumably had attended some school but still no certificate of his date of birth or any other proof was available on record. In the present case, the date of birth certificate of the appellant is available on record but is ignored on a consideration which may not sound valid. Preference given on the basis of appearance noticed by the court or a doctor would not be an evidence in strict sense. The Hon'ble Supreme Court in the case of **Jitendra Ram (supra)** referred to a case of **Krishan Bhagwan vs. the State of Bihar, (1989) Patna 217,** Full Bench decision of Patna High Court in regard to due enquiry which the Courts are expected to hold for determining the age of an accused on the date of commission of an offence. Hon'ble the Supreme Court has approved the approach adopted by the Full Bench in this regard. It would be of advantage to reproduce the relevant observations of the Full Bench in this regard to understand the nature of enquiry envisaged:-

" Section 32 vests power in the Juvenile Court to make due enquiry in respect of the age of the accused on the date of the commission of the offence and for that purpose such Court has to take evidence as may be necessary and to record a finding whether the accused in question was a juvenile. It need not be pointed out that it is not possible for this Court to determine the age of an accused on the date of the commission of the offence because that has to be determined on the basis of the evidence to be adduced and other materials in support thereof being produced. This determination should not be based merely on written opinion of the doctors produced before this Court. Prosecution has right to cross-examine such medical or forensic experts who have given their opinion about the age of the accused in order to demonstrate that the accused was not a juvenile on the date of the commission of the offence. This is necessary because by the time the plea is taken before the appellate court in almost all the cases the accused concerned must have ceased to be juvenile due to lapse of time making it more difficult for the appellate Court as well as the Juvenile Court to determine as to what was his age at the time of the commission of the offence. In my view, in such a situation, the Courts including Juvenile Court should get the accused held guilty of serious offences, examined by a Medical Board and should determine the age of such accused on basis of the materials on the

record including the opinion of the Medical Board. Once the legislature has enacted a law to extend special treatment in respect of trial and conviction to juveniles, the Court should be jealous while administering such law so that the delinquent juveniles derive full benefit of the provisions of such act but, at the same time, it is the duty of the Courts that the benefit of the provisions meant for juveniles are not derived by unscrupulous persons, who have been convicted and sentenced to imprisonment for having committed heinous and serious offences, by getting themselves declared as children or juveniles on the basis of procured certificates. According to me, if the plea that the accused was a child or juvenile on the date of the commission of the offence is taken for the first time in this Court,then this Court should proceed with the hearing of the appeal, as required by Section 26 of the Juvenile Act and should record a finding in respect of the charge which has been levelled against such an accused. If such an accused is acquitted, there is no question of holding any enquiry in respect of the accused being a child on the relevant date but, if the finding of the guilt recorded by the Court below is affirmed and this Court on the basis of materials on record is prima facie satisfied that the accused may be a child/juvenile within the meaning of the relevant Act on the date of the commission of the offence, it should call for a finding from the Children's Court/Juvenile's Court in accordance with

> Section 32 of the Act. If the finding so received is accepted by this Court, then this Court in terms of Section 26 of the Juvenile Act should pass an order directing the Juvenile Court to pass orders in accordance with Sections 21 and 22 of the Act."

Reference is also made to the case of **Bholla Bhagat vs. State of Bihar, 1998 (1) RCR (Crl.)** 21, wherein it is held that an obligation has been cast on the Court that where such a plea is raised having regard to the beneficial nature of the socially oriented legislation, the same should be examined with great care. Of course, as observed by the Hon'ble Supreme Court, it does not mean that the person, who is not entitled to the benefit of the said Act, would be dealt with leniently only because such a plea is raised. Each plea is to be judged on its own merit. Each case is required to be considered on the basis of materials placed on record.

While dealing with the plea raised by the appellant that he be tried by the Juvenile Court, the trial Court had before it the date of birth certificate produced by the defence. Against this the trial Court has relied upon the appearance of the appellant and evidence given by doctor Sanjeev Kumar. The reasons for which the trial Court has preferred to rely upon its own observations in regard to the appearance of the appellant and the evidence of a doctor while ignoring the date of birth certificate apparently are not justified. The whole fallacies appears to be from the date of birth as noticed in the order which is contrary to the entries in the date of birth certificate. The main reason which weighed with the trial Court in ignoring the date of birth certificate was that a person generally is not given

name at the time of birth. It is now noticed that the date of birth was recorded after 18 days of the birth. This aspect appears to have escaped consideration of the trial Court. The evidence given by doctor Sanjeev Kumar to determine the age of the appellant can not be of much avail. He had never examined the appellant in any manner to determine his age. The evidence of doctor Sanjeev Kumar (PW-5) is relied upon by the trial Court to say that the appellant was 17 years old as this is the age mentioned in his evidence/ report. This evidence would not be a safe method to say that the age of the appellant was more than 16 years. By his cross-examination the evidence given by PW5 appears to have been demolished totally. He clearly conceded that he had given the age of the appellant from his appearance. He further admitted by stating "I have seen the accused person in the Court he may be 16 years of age also". His version that the appellant was 17 years of age which has been relied upon by the trial Court as such would be unacceptable.

Original date of birth certificate produced by the appellant when perused would show that the date of birth of the appellant as given in this certificate is 01.01.1979 and not 18.01.1979 as observed by the trial Court. 18.01.1979 is the date of registration of the birth. It would thus mean that the date of birth of the appellant was registered after 18 days of his birth. This would to an extent meet the observation/objection of the trial Court that the newly born is not immediately named and generally the families take some time to do so. The registration was done obviously after 18 days of the birth of the child and it would not be unreasonable to assume that by

this time the child might have been given a name. Obviously, the trial Court has missed looking the case from this angle. Even otherwise the action of the trial Court in observing the date of birth of the appellant on the basis of his appearance would not be a sound or good mode for so doing to determine his age. It is rather not possible to determine somebody's age from the appearance alone. Appearances in most of the cases are always deceptive. In any case this mode can not be given preference over the date of birth certificate to determine the age. The reference to the evidence of doctor Sanjeev Kumar again is required to be assessed and appreciated in the light of the evidence furnished through the date of birth certificate produced by the appellant. It would not be possible to ignore the evidence given by the appellant on the basis of his birth certificate when compared with the age recorded from appearance which is rather unsafe mode which may even not be acceptable. In **Sandeep @ Pappi vs. State of M.P. 1994 (2) (Crimes) 171,** it is held that juvenile Court should rely on school leaving certificate in the absence of any material on record showing infirmity in the certificate. In this case, school leaving certificate showed the accused to be aged 16 years whereas medical certificate showed him to be 17 to 19 years old. Observations made by the Hon'ble Supreme Court in **Ramdeo Chauhan @ Raj Nath vs. State of Assam, 2001 (5) SCC** 714, in regard to school leaving certificate may also need to be kept in view. In this case the entries were not held reliable as nothing could be shown for accepting their authenticity in terms of Section 35 of the Indian Evidence Act. However, in the present case, reliance is on date of birth certificate and not on any entry from the school

register. The finding of the Court in regard to the age of the appellant can not thus be upheld. If one looks at Section 32 of the Act, then it is clear that the Section contemplates full dress enquiry about the age. Mere appearance is not a safe test to decide the age of an accused. Finding regarding age of a person should not be based on his physical appearance as has been done in this case. This evidence would not form a sufficient basis to discard the cogent evidence led by the defence in the form of date of birth certificate of the appellant. In my considered opinion the trial Court did not take into consideration the valid material and evidence available on record, while declining the prayer of the appellant that he be treated as a juvenile and his trial be sent to the Juvenile Board. This finding of the trial Court, as such cannot be sustained on the basis of material and evidence available on record.

Next question that would arise is as to what is now required to be done? Once this beneficial law is enacted extending special treatment to juveniles, then the courts are to ensure that while administering such laws juveniles can derive full benefits therefrom. Of course the courts are also to see that no unscrupulous element take unfair advantage of the provisions. Since this plea goes to the very root of the jurisdiction it can even be permitted to be taken for first time before appellate or higher courts. Hon'ble Supreme Court in the case of **Gopinath Ghosh vs. State of West Bengal, AIR, 1984 SC 237,** allowed such a plea to be taken for the first time before it. In present case, however, this plea is raised before the trial Court and is repeated here before me in appeal.

In **Gopinath Ghosh's case (supra),** the conviction under Section 302 IPC and sentence was set aside and case remitted to Magistrate for disposal. Full Bench of Patna High Court in **Krishan Bhagwan's case (supra)** went into the question of procedure to be adopted in such cases. The relevant observations in this regard are:-

> "As such it has to be held that a plea that the accused in question was a child within the meaning of the Act can be entertained at the appellate stage. At the same time it should not be overlooked that many accused persons who have been tried and convicted for serious offences like murder, dacoity and rape may take this plea in the appeal just to get rid of the sentence of rigorous imprisonment imposed against them although there are hardly any material on the record in support of the plea that such accused persons on the date of the commission of the offence were children within the meaning of the Act. There may be case where either in the First Information Report itself the accused might have been described as below 16 years of age or during the trial his age has been determined or admitted to be below 16 years on the date of occurrence. In such cases no further enquiry in respect of his age is called for and this Court can extend the benefit of the Children Act/Juvenile Act to such an accused. But, in other cases, on the materials on record , it may not be possible for this Court to be satisfied even in a prima facie manner that accused may be a child on the date of commission of the offence. In such cases there is no question of directing

determination of the age of the accused concerned on the date of commission of the offence. However, if this Court is satisfied in a prima facie manner that on the date of the commission of the offence the accused may be a child, this Court may direct the competent authority to determine the age of such accused on the relevant date in accordance with Section 32 of the Juvenile Act."

It is already held above that the finding about the age of the appellant was not properly gone into and can not be sustained. Prima facie it appears that the appellant may be a juvenile on the date of commission of offence and, as such, enquiry in terms of Section 32 of the Act would be called for. If the finding comes in his favour then Court may have to pass orders in terms of Sections 21 and 22 of the Act. It is not for the first time this plea is being raised before the court and provisions of Section 26 of the Act are not applicable in this case for the Court to go into merits to see if appeal is required to be allowed so that exercise of determining the age of appellant be avoided. The Hon'ble Supreme Court in **Jitendra Ram's case (Supra)** has remitted the case back to the trial Court for determining the age of the appellant as on the date of commission of offence, when it was noticed that this aspect has not been properly gone into and decided by the trial Court. Adopting the same course I am also of the view that determination of age of the appellant as on the date of commission of offence is required to be done afresh by the learned Sessions Court at Fatehgarh Sahib. I have not applied my mind to the evidence otherwise available on record minutely but prima facie I could not find any justification to interfere with the

findings recorded on merits of the case. The case, however, is remitted back to the Sessions Judge, Fatehgarh Sahib with direction to consider the matter as regard to the age of the appellant as on the date of commission of offence and if the findings that the appellant is a juvenile within the meaning of Juvenile Justice Act 1986 then to deal with him accordingly in accordance with law. In case the trial Court finds that the appellant is not a juvenile then the appellant would be entitled to challenge the same by way of appeal and the appeal would be considered and decided on merits.

Since the case is remitted back to the trial Court for determining the age of the appellant on the date of commission of offence, the parties would be at liberty to lead any further evidence in support of their respective plea but limited to the aspect of determining the age of the appellant as required. Parties through their counsel are directed to appear before the trial Court on 20.11.2007. Let the case be sent to Sessions Judge, Fatehgarh Sahib, who may either hear the same himself or assign it to any Court of Additional Sessions Judge. If, the court, after enquiry that may be held, comes to the conclusion that the appellant is a juvenile it shall record its finding and may then send the case to juvenile Court for further proceedings in accordance with law applicable to him.

(RANJIT SINGH)
JUDGE

October 09, 2007
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